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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 769

EDWARD JACKSON MURRAY,
Petitioner,

vs.

LT. GEN. ALBERT C. WEDEMEYER, United States Army, Commanding General, 6th Army, Presidio of San Francisco, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

GILBERT S. WOOLWORTH,
1095 Market Street, San Francisco 3, California,
Attorney for Petitioner.

JAMES T. DAVIS,
1095 Market Street, San Francisco 3, California,
Of Counsel.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Edward Jackson Murray, hereinafter called "Petitioner", respectfully prays that a writ of certiorari

issue to review a decision of the United States Court of Appeals for the Ninth Circuit, rendered on January 20, 1950, dismissing the appeal and its decision rendered on March 20, 1950, denying appellant's petition for a rehearing. This case was brought to the United States Court of Appeals for the Ninth Circuit under the provisions of Title 28, United States Code, Sec. 2253.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit dismissing the appeal is reported in 179 F. (2d) 963, and a copy is attached hereto as Appendix A. A copy of the Court's order denying petition for rehearing is attached hereto as Appendix B. The Court's order staying issuance of Mandate is attached hereto as Appendix C.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 United States Code. Petitioner also relies on Rule 38 of this Court.

STATUTES.

The Statutes and Army Regulations involved are the following:

Sec. 1457b of Title 10 United States Code, copy attached as Appendix D.

Paragraphs 7, 9, 10a, Army Regulations, 30 Sept. 1947, copy attached as Appendix E.

Paragraph 26, Circular 64, Department of the Army, 10 March 1948, copy attached as Appendix F.

Special Regulations, No. 600-395-1, Department of the Army, 7 January 1949, Section I, paragraphs 3b and 5; Section II, paragraph 5, copy attached as Appendix G.

STATEMENT OF THE MATTER INVOLVED IN PETITION.

The Petitioner was convicted by an Army Court-Martial and was sentenced as confirmed, to dismissal, forfeiture of all pay and allowances and five years confinement at hard labor in Branch U. S. Disciplinary Barracks, Camp Cook, California. He was released on *parole* on December 4, 1949, and still has over three years of his sentence to serve, less allowance for good conduct time.

December 14, 1948, a writ of habeas corpus was issued out of the U. S. District Court for the Northern District of California, Southern Division. This writ was discharged September 1, 1949, whereupon petitioner appealed to the U. S. Court of Appeals for the Ninth Circuit. The appellee moved to dismiss the appeal on the ground that the question of appellant's wrongful detention had become moot, for the reason that he was on *parole*. On January 20, 1950 the U. S. Court of Appeals for the Ninth Circuit entered judgment dismissing the appeal. On February

18, 1950 appellant filed petition for rehearing and for stay of Mandate. The petition for rehearing was denied and Order Staying Issuance of Mandate made.

QUESTION PRESENTED.

Has this cause become moot for the reason that appellant, a military prisoner, has been released on parole, although his sentence, less good conduct allowance, has not expired?

REASONS FOR GRANTING WRIT.

1. Conflict of decision of United States Court of Appeals for the Ninth Circuit in petitioner's case with decisions of the United States Supreme Court.

In *Anderson v. Corall,* 263 U.S. 193, this Court held that a parolee remained in the legal custody and under the control of his jailer. In the cases cited under Point III of the brief, infra, this Court held in substance that although the sentence of one convicted had expired the case was *not moot* because of the disabilities and burdens which might flow from the judgment improperly obtained, if the case were dismissed as moot.

2. Conflict of Decision Between Circuits.

The decision of the Seventh Circuit in *Hughes v. Pfland,* 138 Fed. 980, infra, is in conflict with the decision of the Ninth Circuit in Petitioner's case.

Wherefore, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
April 17, 1950.

Respectfully submitted,
GILBERT S. WOOLWORTH,
Attorney for Petitioner.

JAMES T. DAVIS,
Of Counsel.

In the Supreme Court
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OCTOBER TERM, 1949

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EDWARD JACKSON MURRAY,
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LT. GEN. ALBERT C. WEDEMEYER, United States Army, Commanding General, 6th Army, Presidio of San Francisco, California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

PRELIMINARY STATEMENT.

Reference is hereby made to the foregoing petition for the opinion below, grounds of jurisdiction, stat-

utes involved, statement of the case, questions presented and reasons for granting the writ.

SPECIFICATIONS OF ERROR.

Petitioner submits that the Court of Appeals erred in the following particular:

In dismissing the appeal on the ground that it is moot.

ARGUMENT.

I.

THE DISMISSAL OF THE APPEAL IN THIS CASE ON THE GROUND THAT IT IS MOOT WAS ERROR.

The United States Court of Appeals for the Ninth Circuit based its dismissal of the appeal herein on the case of *Bledsoe v. Johnston,* 9 Cir. 164 F. (2d) 481 (1948), (Appendix A). In that case the Circuit Court said, *inter alia,* "It is unnecessary for us to decide whether such 'imprisonment' is a custody which, if wrongful, warrants the issuance of the writ of habeas corpus. It is apparent that *such custody does not extend over the period of his release due to his good conduct allowance.* Since the appellee's Warden no longer has *any custody* of appellant *of any kind,* appellant's contention of his wrongful detention *is moot* and the *appeal must be dismissed.*" (Emphasis supplied.)

Your petitioner is a military prisoner on parole, and in the *custody* and under the *control* of the Commanding General, 6th Army, and the Commandant, U. S. Disciplinary Barracks, Camp Cook, California. (Appendices D, E, F, G, supra.) *His sentence has not expired and he has not been released due to good conduct allowance.*

Bledsoe was a federal prisoner (as distinguished from a military prisoner). The Court apparently based its above quoted language on 18 U.S.C. 716 (1927 Edition)[1] without reference to the Amendment of June 29, 1932 (47 Stat. 381, 18 U.S.C. 416).[2] In our submission the decision of the 9th Circuit in *Bledsoe v. Johnston,* was contrary to the substantive law then in effect, and contrary to the decision of this Court in *Anderson v. Corall,* 263 U.S. 193, and the decision in petitioner's case when sentence, less good conduct time, had *not* expired was likewise error.

---

[1]This section provided that a paroled prisoner remained "in the legal custody * * * of the Warden * * * until the expiration of the term * * * specified in the sentence, *less such good time allowance as is or may hereafter be provided for by law.*" (Emphasis supplied.)

[2]"A prisoner having served the term or terms for which he shall have been sentenced after June 29, 1932, less good time deductions, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced. * * *"

II.

THIS CAUSE IS NOT MOOT FOR THE REASON THAT APPELLANT, A PAROLED MILITARY PRISONER IS IN THE CUSTODY AND UNDER THE CONTROL OF THE COMMANDANT OF THE UNITED STATES DISCIPLINARY BARRACKS AND THE COMMANDING GENERAL, 6TH ARMY, AND IS STILL IN LEGAL EFFECT IMPRISONED AND HIS LIBERTY RESTRAINED UNTIL THE EXPIRATION OF HIS SENTENCE, LESS GOOD CONDUCT TIME.

Title 10 U.S.C., Secs. 1455, 1457b;[3]

Army Regulations 600-415, Sept. 30, 1947, pars. 7, 9, 10a;[4]

Circular 64, Department of the Army, 10 March 1948;[5]

Special Regulations, No. 600-395-1, Department of the Army, 7 January 1949;[6]

Anderson v. Corall, 263 U.S. 193;

Clark v. Surprenant, 94 Fed. (2d) 969;

Anderson v. Williams, 279 Fed. 822;

Rosenthal v. Hunter, 164 Fed. 949;

People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 260, 158 N.E. 613, 614;

Hughes v. Pfland, 138 F. 980;

Drinkall v. Spiegel, 68 Conn. 441, 36 At. 83;

Nicholson v. Bush, 136 Tenn. 478, 190 S.W. 453;

Sellers v. Bridges (Fla.) 15 So. (2d) 293;

Carpenter v. Lord, 85 Or. 128, 171 Pac. 577.

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[3]Appendix D.
[4]Appendix E.
[5]Appendix F.
[6]Appendix G.

In *Anderson v. Corall,* supra, the Court said:

> "The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While parole is an amelioration of punishment, it is in *legal effect* imprisonment."

The Court further said: "mere lapse of time without imprisonment *or other restraint contemplated by law* does not constitute service of sentence. (Emphasis supplied.) The Supreme Court has never reversed its holding in this case. In our submission the restraints provided for parolees by Army Regulations (Appendix E, supra) are within the purview of "other restraints contemplated by law."

In *Clark v. Surprenant,* supra, the Court held as a

> "basic principle * * * that a paroled prisoner endures a part of his punishment within prison walls and a part thereof within the terms of his parole."

In *Anderson v. Williams,* supra, the Court said:

> "A parole of a prisoner * * * is a substitution during the continuance of the parole, of a lower grade of punishment, by *confinement* in the legal *custody* and under the *control* of the warden within the specified prison bounds outside the prison, for the confinement within the prison adjudged by the Court * * *." (Emphasis supplied.)

In *Rosenthal v. Hunter,* supra, the Court said:

"So long as petitioner was on parole from the California penal institution, he was within the constructive custody of the State of California". (Citing *Ex parte Taylor,* 216 Cal. 113.)

In *Sabatino v. Jennings,* supra, quoted with approval in *Eagles v. U. S.,* infra, Mr. Justice Cardozo, then Chief Justice of N. Y. Court of Appeals, said:

"The writ cannot be abrogated or its efficiency curtailed by *legislative action.*" (Emphasis supplied.)

In *Hughes v. Pfland,* supra, the petitioner for habeas corpus had been convicted of a felony in Indiana and had been paroled. He went to Kentucky while on parole. He was arrested in extradition proceedings to be returned to Indiana. The Court held that in effect he had escaped from *custody and* "under such circumstances the convicted defendant is not a free agent to go as he pleased, like he would be if he had been admitted to bail. He is under the immediate restraint of the Court and in its *custody* for all practical purposes. He is enduring *compulsory* expiation of an offense". (Emphasis supplied.)

In *Drinkall v. Spiegel,* supra, in discussing the effect of parole the Court said:

"When the plaintiff was liberated from confinement within the reformatory and found himself at large in the State of New York he was in effect within the prison liberties. But it is the settled doctrine on this subject that the liberties

> of the prison is an extension or enlargement of the walls. A person, therefore, is in prison in legal contemplation, when within the liberties of the prison. An escape from the liberties is an escape from prison."

In *Nicholson v. Bush,* supra, the petitioner was convicted of assault with intent to commit murder and sentenced to the penitentiary. At the same term he was convicted of carrying a pistol and sentenced to the work house. While serving his penitentiary sentence he was paroled, and the sheriff arrested him and sought to incarcerate him in the work house. He was released on habeas corpus on the ground that he was still in *custody* under the first sentence.

In *Sellers v. Bridges,* supra, petitioner had pleaded guilty and while serving sentence was paroled. He then applied for release on habeas corpus on the ground that the information did not state an offense, therefore, his detention and restraint was illegal. The Court said in sustaining the writ:

> "The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal *restraint.* He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of *choice* and *action.* Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody? * * *

> Parole, therefore, is not an act of amnesty or forgiveness, as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence * * * Once secured, and upon the terms and conditions imposed by the commission, prisoners become parolees, (trusties outside prison walls, as it were) but prisoners amenable to discipline, direction, and supervision of prison system officials none-the-less. * * * Can there be any doubt but that the terms and conditions imposed by the parole commission operate to greatly *restrict the fundamental liberties and privileges of the individual?* * * * The petitioner is discharged * * *." (Emphasis supplied.)

In *Carpenter v. Lord,* supra, the Supreme Court of Oregon, in banc, in granting habeas corpus and setting aside the governor's order for extradition of a convict on parole held that the parolee was still in *custody* of the prison authorities.

III.

THIS CAUSE IS NOT MOOT FOR THE REASON THAT FURTHER PENALTIES AND DISABILITIES CAN BE IMPOSED UPON APPELLANT, BOTH UNDER STATE AND FEDERAL LAW, AS A RESULT OF THE ILLEGAL JUDGMENT OF THE COURT-MARTIAL.

U. S. ex rel. Hirshberger v. Cooke, 336 U.S. 210, 93 L. Ed. 487;

Fiswick v. U.S., 329 U.S. 211, 222, 91 L. Ed. 196;

St. Pierre v. U. S., 319 U.S. 41;
Eagles v. U. S. ex rel. Samuels, 329 U.S. 304, 306-8.

Appellant stands convicted of felonies under five specifications and was sentenced, as confirmed, to dismissal from the service, confinement at hard labor for five years and forfeiture of all pay and allowances due or to become due. (Tr. 13-19.)

The penalties and disabilities which can be imposed upon him if conviction stands, under *state* law are:

(a) Loss of the right of suffrage. California Constitution, Art. II, Sec. 1.

(b) Exclusion from: holding office in the State of California, serving on juries, right of suffrage. California Constitution, Art. XX, Sec. 11.

The penalties and disabilities which can be imposed upon him if conviction stands, under *federal law* are:

(a) Cannot receive back pay due him. (Tr. 13-19.)

(b) Cannot be reinstated in his civil service position in the California State Highway Department. (Soldiers and Sailors Civil Relief Act.)

(c) Ineligible to retirement from the Army and to other benefits extended to veterans of World Wars I and II by federal law.

(d) Ineligible to retain commission in the Army.

In *U. S. ex rel. Hirshberger v. Cooke,* supra, Hirshberger was sentenced to ten months imprisonment on August 12, 1947. The petition for habeas corpus was filed before his sentence expired, as it was in Colonel Murray's case, but the Supreme Court heard the case on January 13, 1949, and reversed the Circuit Court of Appeals, February 28, 1949, more than eight months after his sentence had *expired.* The case was *not* held ***moot.***

In ***Fiswick v. U. S.,*** supra, the Supreme Court in reversing the Circuit Court of Appeals, held that although Fiswick's sentence had expired the case was ***not moot*** because of the disabilities and burdens which might flow from the judgment, improperly obtained, if the case were dismissed as moot.

In *St. Pierre v. U. S.,* supra, the Court said:

> "* * * We are of the opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this court could operate * * *."

The Court further said:

> "* * * *nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied* * * * But the moral stigma of a judgment which no longer affects *legal rights* does not present a case or controversy for appellate review * * *." (Emphasis supplied.) (It should be noted that the petitioner in above case was convicted of a ***misdemeanor*** and *not* a *felony.*)

In *Eagles v. U. S.*, supra, a petition for writ of habeas corpus upon return and after hearing was ordered dismissed by District Court. On appeal, the Circuit Court of Appeals reversed and remanded the cause to the District Court with directions to "discharge Samuels from military custody * * *" and he was thereupon unconditionally released from military custody. The Court, in holding the case *not* moot said:

> "Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. St. Pierre v. United States, 319 U.S. 41, 42 * * * and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the habeas corpus court did and makes lawful a resumption of the custody."

The government in Murray's case now argues in effect "what is sauce for the goose is *not* sauce for the gander"; that Murray, paroled by virtue of statute (10 U.S.C. 1457b, supra) and regulation, who is still in *custody* (pars. 9 and 10b Army Regulations 600-415, supra), whose liberty is restrained (par. 7 Army Regulations 600-415, supra) should be denied the right to appeal on the ground that the case is moot. One might well inquire: "Must a prisoner be in shackles, to warrant the issuance of a writ of habeas corpus?"

IV.

THE DISMISSAL OF THIS APPEAL WILL IN SUBSTANCE AMOUNT TO A SUSPENSION OF THE RIGHT TO THE WRIT OF HABEAS CORPUS.

U. S. Constitution, Art. I, Sec. 4;
Bowen v. Johnston, 306 U.S. 19;
Price v. Johnston, 334 U.S. 266, 283;
People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 260, 158 N.E. 613, 614;

In *Bowen v. Johnston,* supra, the Court said:

> "The writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired."

In *Price v. Johnston,* supra, the Court said:

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently *elastic* so that a court may, in the exercise of its proper jurisdiction, deal effectively *with any and all forms of illegal restraint.* The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ." (Emphasis supplied.)

In *Sabatino v. Jennings,* supra, Chief Justice Cardozo said:

> "Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer. A statute suspending the effect of the discharge by the mere force of an appeal would be at war with the mandate of the constitution whereby the writ of habeas corpus is preserved in all its ancient

plenitude. Const., Art. I, Sec. 4. The writ cannot be abrogated, or its efficiency curtailed by legislative action. People v. Lipscomb, 60 N.Y. 559, 19 Am. Rep. 211.) Little would be left of this the greatest of all writs (People v. Lipscomb, supra) if a jailor were permitted to retain the body of the prisoner during all the weary process of an appeal begun without cause and languidly continued * * *."

Should the appeal in this case be denied on the ground that it is moot, in our submission it would amount to saying that a jailer may thwart at his pleasure the writ by placing a petitioner therefor on parole pursuant to *legislative authority*. No such purpose may lightly be imputed to the Congress in the face of the mandate of the Constitution. (In this connection, it may be noted that English law provided heavy penalties for a jailer who changed the status of a prisoner during the pendency of an application for habeas corpus.)

The holding of the United States Court of Appeals dismissing appellant's appeal on the ground that the case is moot is contrary to the plain language of this Honorable Court in *Anderson v. Corall,* supra (which has not been reversed), contrary to the principle laid down by this Court in the *Hirshberger, Fiswick, St. Pierre* and *Eagles* cases, supra, contrary to the weight of authority of State Courts, and in effect deprives this appellant of judicial review of denial of habeas

corpus, and in further effect fringes on suspension of the writ, which is forbidden by the Constitution.

Dated, San Francisco, California,
April 17, 1950.

Respectfully submitted,
GILBERT S. WOOLWORTH,
Attorney for Petitioner.

JAMES T. DAVIS,
Of Counsel.

(Appendices A to G Follow.)

Appendix A

In the United States Court of Appeals for the Ninth Circuit

Edward Jackson Murray, Appellant, vs. Lieutenant General Albert C. Wedemeyer, United States Army, Commanding General, Sixth Army, San Francisco, California, Appellee.	No. 12,380 Jan. 20, 1950

Upon Appeal from the United States District Court, Northern District of California, Southern Division

Before: Healy, McAllister,* and Orr, Circuit Judges

Per Curiam

This is an appeal from a judgment denying a writ of habeas corpus. The appellee has moved for a dismissal of the appeal on the ground that during its pendency appellant filed an application for parole, that the application was granted, and that appellant is no longer in the physical custody of appellee or any of his aides or representatives.

*Sixth Circuit, sitting by special designation.

It appears that the facts are as stated in the motion. While the situation differs somewhat from that disclosed in Bledsoe v. Johnston, 9 Cir., 164 F. (2d) 481, we think the principle there applied is nevertheless applicable. The appeal is accordingly dismissed on the authority of that decision.

(Endorsed:) Per Curiam Opinion. Filed Jan. 20, 1950. Paul P. O'Brien, Clerk.

Appendix B

Office of Clerk
U. S. Circuit Court of Appeals
San Francisco, Calif.
P.O. Box 547

March 20, 1950

James T. Davis, Esq.,
Attorney at Law
1095 Market Street
San Francisco, California

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 12380, Murray v. Wedemeyer, etc., was this day denied.

Very truly yours,
Paul P. O'Brien
Clerk

Appendix C

United States Circuit Court of Appeals
for the Ninth Circuit

Edward Jackson Murray, Appellant, vs. Albert Wedemeyer, Commanding General, Sixth Army, Appellee.	No. 12,380

ORDER STAYING ISSUANCE OF MANDATE

Upon application of James T. Davis, Esq., counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before April 24, 1950. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Dated, San Francisco, California,
March 20, 1950.

William Healy,
United States Circuit Judge

(Endorsed) Filed, March 20, 1950.

Paul P. O'Brien,
Clerk.

Form No. 14.

Appendix D

"The Secretary of the Army is authorized to establish a system of parole for prisoners confined in the United States Disciplinary Barracks and its branches, the terms and conditions of such parole to be such as the Secretary of the Army may prescribe." 10 U.S.C.A. 1457b.

Appendix E

"Jurisdiction of Commandant—Parole granted pursuant to these regulations will not have the effect of releasing the paroled prisoner from the *legal custody and control* of the installation from which he is paroled until the expiration of the term * * * of confinement imposed *(less good conduct time)*." (Emphasis supplied.) Army Regulations 600-415, Par. 9, September 30, 1947.

"A paroled prisoner who complies with the conditions of his parole will be released from the *custody* of the Commandant at the termination of his term * * * as reduced by such deductions for good conduct as he may have earned." (Emphasis supplied.) Army Regulations 600-415, Par. 10a; Sept. 30, 1947.

"Conditions of parole * * *

b. Specific requirements. The following are the specific conditions under which a prisoner will be granted parole:

(1) When released on parole he will go without delay to the place specified in the Parole Agreement.

(2) Upon arrival he will report to his parole advisor in person or in writing as directed by the Command and will send the prescribed form letter, "Report of Arrival of Parolee" to the Commandant.

(3) He will remain within the limits prescribed in the Parole Agreement and if he has justifiable cause to

leave these limits temporarily, he will first obtain written permission from his parole advisor.

(4) He will not change the residence or employment approved in his parole plan without receiving permission from his parole advisor. Permanent changes removing the parolee beyond the geographical limitations prescribed in the Parole Agreement will not be made without the approval of his parole advisor and the written prior consent of the Commandant.

(5) First of each month and final day of parole period make a full and truthful written report on AGO form 01125 through parole advisor to the Commandant * * *." Army Regulations 600-415 Par. 7; Sept. 30, 1947.

Appendix F

Circular 64, Department of the Army, 10 March 1948, paragraph 26:

The Commanding General of each of the armies * * * commands all Class I installations within the army areas * * *. The Commanding General of each of these armies is responsible for the operations, training, administration, services, and supply of all units, posts, camps, stations and installations of his command.

Appendix G

Special Regulations
No. 600-395-1

Department of the Army
7 January 1949

Section I, paragraph 3b.

Army Commanders—Army Commanders command and operate disciplinary barracks within their jurisdiction, as Class I installations.

Paragraph 5—The following branch U. S. disciplinary barracks established under the provisions of the Act of 4 March 1915 (38 Stat. 1086; 10 U.S.C. 1458) are Class I installations under the control of the Commanding Generals of the respective armies:

* * *

Camp Cooke, California

* * *

Section II

Paragraph 3. Escaped general prisoners and parole violators from disciplinary barracks who are confined in civil penal institutions will, when released by civil authorities, be returned for confinement to the disciplinary barracks from which they escaped or were paroled by the *Army Commander of the area in which the disciplinary barracks is located,* unless otherwise directed by the Department of Army. (Emphasis supplied.)

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 769

EDWARD JACKSON MURRAY, PETITIONER

v.

LIEUTENANT GENERAL ALBERT C. WEDEMEYER, UNITED STATES ARMY, COMMANDING GENERAL, SIXTH ARMY, PRESIDIO OF SAN FRANCISCO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT

Despite petitioner's earnest insistence to the contrary, it is clear that this habeas corpus proceeding has been rendered moot as the result of his release from imprisonment on parole granted on his own application therefor during the pendency of his appeal from the order of the District Court dismissing, after hearing, his petition for a writ of habeas corpus (R. 136, 141–142; Pet. 3). The cases cited by petitioner are inapposite, for it is settled law in the federal courts that, except where release is obtained in connec-

tion with the habeas corpus proceeding itself, habeas corpus will not lie where there is no physical or bodily restraint from which the petitioner could be released by the writ. Mere moral restraint imposed by technical arrest or custody or by conditions of parole or bail will not support habeas corpus. See *Eagles* v. *Samuels,* 329 U. S. 304, 306–307; *Baker* v. *Hunter,* 323 U. S. 740;[1] *Zimmerman* v. *Walker,* 319 U. S. 744; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Ex parte Weil,* 317 U. S. 597; *Weber* v. *Squier,* 315 U. S. 810; *McNally* v. *Hill,* 293 U. S. 131, 137, 139; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Johnson* v. *Hoy,* 227 U. S. 245; *Wales* v. *Whitney,* 114 U. S. 564, 571–574; *Van Meter* v. *Sanford,* 99 F. 2d 511 (C. A. 5); *United States* v. *Tittemore,* 61 F. 2d 909 (C. A. 7); *Unverzagt* v. *United States,* 5 F. 2d 494 (C. A. 9), certiorari denied, 269 U. S. 566.[2]

[1] The *Baker* case (No. 151, Oct. Term 1944) involved a federal prisoner released on expiration of his minimum term and subject, under 18 U. S. C. (1940 ed.) sec. 716b (now 18 U. S. C. 4164), to being treated as if released on parole until the expiration of his maximum term. Substantially the same arguments against mootness were made there as are presented by the instant petitioner.

[2] *Hirshberg* v. *Cooke,* 336 U. S. 210, and *Eagles* v. *Samuels,* 329 U. S. 304, do not aid petitioner (see Pet. 16, 17), for in those cases the petitioners had been released pursuant to the judgments of the lower courts and the custodians sought reversal. This Court pointed out in the *Eagles* case that different considerations apply, on the issue of mootness, where "release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

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issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. *St. Pierre* v. *United States*, 319 U. S. 41, 42, and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the *habeas corpus* court did and makes lawful a resumption of the custody." 329 U. S. at 307–308.

Petitioner is mistaken in asserting (Pet. 16) that the *Hirshberg* case was decided in this Court after the sentence had expired. As we have pointed out, Hirshberg was released from custody pursuant to the judgment of the District Court and, obviously, his sentence did not continue to run after that time.

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